92-63

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTONIO ZAPATA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals and United States Sentencing Commission misinterpreted the penalty provision of 21 U.S.C. 841(b)(1)(B)(iv) which provides that in a case involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)", the penalty is five to forty years, to require the conversion of a mixture or substance containing PCP to pure PCP and then imposing sentence based upon whether the mixture weight or net pure weight provided for the greater penalty?

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IN THE
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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Antonio Zapata, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 15, 1992.

OPINION BELOW

On 15 June 1992, the Court of Appeals vacated Petitioner's sentence and remanded for a recalculation of his sentence without career offender status. However,

the Court of Appeals held that the sentence should be recalculated based on conversion of the mixture containing Phencyclidine (PCP) to a net pure amount[1]. A copy of the 15 June 1992, Memorandum Opinion, which is unpublished, is attached as Appendix A.[2]

STATEMENT OF JURISDICTION

On 15 June 1992, the Court of Appeals entered its Memorandum Opinion rejecting the petitioner's contention that a drug mixture containing PCP should not be converted to a net pure amount to determine the penalty. On 29 June 1992, a timely petition for rehearing was filed.

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[1] No other petitioner is involved in this petition. There was a codefendant in the District Court whose separate Circuit Court appeal (*U.S. v. Sam Quiroz*, C.A. No. 91-10289) raised the same issue presented herein. Counsel is advised that a petition for certiorari in that case will be filed in this Court on or about October 8, 1992.

[2] The Memorandum Opinion has been reformatted to comply with this Court's printing requirements. References are made to the pages as reformatted.

On 10 August 1992, the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. A copy of the order of 10 August 1992 is attached as Appendix B.

This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

The district court had jurisdiction over this federal criminal case under 18 U.S.C. 3231 and the Court of Appeals had jurisdiction under 28 U.S.C. 1291.

STATUTES INVOLVED

21 U.S.C. 802

. . .

> "(40) The term 'chemical mixture' means a combination of two or more chemical substances, at least one of which is not a listed precursor chemical or a listed essential chemical, except that such term does not include any combination of a listed precursor chemical or a listed essential chemical with another chemical that is present solely as an impurity."

21 U.S.C. §841(a) provides, in pertinent part:

> "(a)...it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;..."

21 U.S.C. §841(b) provides, in pertinent part:

"(b)...[A]ny person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-....

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

....

(viii) 100 grams or more of methamphetamine...or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine...

such person shall be sentenced to a term of imprisonment which may not be less than 10 years....

(B) In the case of a violation of subsection (a) of this section involving-

....

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

....

(viii) 10 grams or more of methamphetamine...or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine...;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years....

(C) In the case of a controlled substance in Schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years...."

STATEMENT OF THE CASE

Petitioner Zapata was convicted at a jury trial of two counts of distribution and aiding and abetting the

distribution of PCP.

Both counts involved mixtures containing PCP and the dilutent, manitol. The two mixtures totalled about 76 grams and were about 71 and 82 percent pure, respectively. Converted to pure, the total amount involved about 59 grams of PCP. (Appendix A at 2-3.)

The presentence report recommended conversion of the mixtures seized to pure to determine the statutory penalty, and recommended that petitioner ZAPATA be sentenced under the career offender guideline, U.S.S.G. §§4B1.1, 4B1.2. (PSR at face sheet, 5, 8-9.) Petitioner ZAPATA filed a motion to correct the presentence report contesting both these recommendations. (CR at 52.)

On May 23, 1991, the district court ruled that the mixture of substance containing PCP should be converted into pure PCP for purpose of determining the statutory penalty, relying on the decision of United States v. Stoner, 927 F.2d 45 (1st Cir.) cert. denied, 112 S.Ct. 129 (1991), and that petitioner ZAPATA was a career

offender under the Sentencing Guidelines. (RT at 10-11, 23, ECR 4-5.[3])

Based upon those rulings, the applicable guideline range was 360 months to life, and the district court sentenced defendant ZAPATA to two concurrent terms of 360 months imprisonment, a $100 special assessment, and an eight year term of supervised release (RT 25-27, ECR 9-11).

The Ninth Circuit held that the petitioner should not have been sentenced under the career offender guidelines, vacated his sentence, and remanded for a recalculation of his sentence without career offender status. (Appendix A at 5-6.)

However, the Ninth Circuit held that conversion of the mixture into pure PCP was required under the statute and sentencing guidelines which approach substantially increases petitioner's sentence. 21 U.S.C.

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[3] "RT" refers to the transcript of the sentencing hearing on May 23, 1991.

841(b)(1)(B)(iv) does not provide for the mandatory minimum penalty of five to forty years unless the mixture containing PCP is at least 100 grams. The penalty in a case such as this, involving a mixture of about 76 grams, is provided for by 21 U.S.C. 841(b)(1)(C) which provides for no mandatory minimum penalty and for a maximum term of not more than 20 years. Where the offender, as here, has a prior conviction, the mandatory minimum and maximum penalty increases under 21 U.S.C. 841(b)(1)(B)(iv) to 10 years to life; whereas there is still no mandatory minimum penalty under 21 U.S.C. 841(b)(1)(C) but the maximum penalty increases to 30 years. The conversion of the mixture here to net pure changes the statutory penalty from 0-30 years to 10 years to life. The Sentencing Guideline ranges are premised on the statutory amounts, require conversion of mixtures containing PCP into net pure amounts, and provide sentence based on whichever amount calls for the greater penalty. The base offense

level for the mixture at issue is level 22, whereas the base offense level for a net pure amount is 28 (Appendix A at 2-3). If the adjustments and criminal history recommendations of the presentence report are followed upon remand, the petitioner's guideline range will be increased from 92-115 months to 168-210 months based on net pure calculations.

The Court of Appeals held that both the statute and sentencing guidelines required conversion of a mixture containing PCP to net pure and application of the whichever greater penalty approach; relying on United States v. Alfeche, 942 F.2d 697 (9th Cir. 1991) and observing that this approach was preferable to deciding in each case how pure the mixture had to be in order to apply the pure threshold amount. (Appendix A at 4-5.)

The panel voted to deny the petition for rehearing. Panel Judge Boochever recommended rehearing en banc but the suggestion for rehearing en banc was rejected. (Appendix B.)

REASONS FOR GRANTING THE WRIT

A. Introduction.

This Court should grant review because the Court of Appeals has decided an important question of statutory construction which has not been, but should be settled by this Court.

Numerous defendants are sentenced in the district courts under the methamphetamine and PCP penalty provisions at issue each year. *See, e.g.*, U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, at p.72 (August 1991).

The Court of Appeals interpretation: ignores the plain language and meaning of the statute, conflicts with this Court's and the Fourth Circuit's reading of the statute; poses line drawing difficulties which ignore a related statutory provision and which conflict with the Second Circuit's view; ignores relevant legislative history; and chooses an interpretation for policy reasons

which are both based on factually erroneous speculative assumptions and at odds with fundamental principles of judicial restraint and the rule of lenity.

B. The Court of Appeals' Rationale.

1. The Decision in This Case and Related Decisions.

The statutory provision at issue provides that in a case involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture containing a detectable amount of phencylidine (PCP)", the penalty is ten years to life with a prior conviction. The statutory language is the same as to methamphetamine. 21 U.S.C. 841(b)(1)(B)(iv)(viii).

The Ninth Court of Appeals' rationale for the conversion of a mixture containing PCP (or methamphetamine) into a net pure amount and imposing sentence based upon whether the mixture or net pure amount calls for the greater penalty is essentially based upon the decision of the First Circuit in United States v. Stoner,

927 F.2d 45, (1st Cir.), cert. denied, 112 S.Ct. 129 (1991).

The court in Stoner, a case involving methamphetamine, rejected the contention that the statute drew a distinction between pure methamphetamine and a mixture containing methamphetamine on the basis that the statute did not use the word "pure" and then proceeded to read the statute as referring to pure methamphetamine, and also read into the statute a directive to convert mixtures into pure amounts. The Stoner court did so on the basis of policy arguments that a non-conversion interpretation would produce illogical results and pose a difficult line drawing task for the courts; and, without discussion of the words themselves, without reference to the related statutory provision of 21 U.S.C. § 802(40), or the legislative history. Having done so, the Stoner court then characterized the statute as unambiguous for purposes of the doctrine of lenity by using the results of its policy analysis to conclude the

language was unambiguous. Id. at 46-47.

Subsequent to Stoner, the Ninth Circuit decided United States v. Alfeche, 942 F.2d 697 (9th Cir. 1991) (per curiam). Alfeche involved methamphetamine and "unknown impurities". Id. at 698. The Court held that the sentence was properly premised on pure methamphetamine rather than the mixture containing methamphetamine. Id. Alfeche is factually distinguishable in that it involved only impurities and not dilutents, as in Stoner and this case; and so, under 21 U.S.C. § 802(40), it did not involve a mixture at all. However, the Alfeche decision is clear that it completely adopts the Stoner decision's conversion and penalty approach to mixtures.

The Opinion in this case relies on Alfeche as dispositive.

Since the decision in this case, the Ninth Circuit has issued a published decision applying the conversion and penalty approach of Stoner and Alfeche in a case involving a mixture of methamphetamine relying upon Alfeche as dispositive. United States v. Asuncion, No. 90-10594, slip opinion at 10244 (9th Cir., Aug. 24, 1992) (1992 W.L. 201086).

2. The Sentencing Guidelines.

The guidelines are of no legal significance to the issue presented on this appeal as the guideline provisions are nothing more than an interpretation of the statutory PCP penalty provision. See, e.g., the 1988 Edition of the Guideline Manual, Guideline §2D1.1(3), application note 9[4]; the 1992 Edition of the Guideline Manual,

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[4] Which provided in full as follows:

> "Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure....
>
> Congress provided an exception to purity considerations in the case of phency-

Appendix C, Amendment 125 at C.73-74.[5]

The presented issue is a pure question of statutory construction which can be answered by traditional tools of statutory construction and which does not involve any agency administrative expertise and so is determined de novo by this Court, NLRB v. Food & Commercial Workers, 484 U.S. 112, 123 (1987); as this Court proceeded in Chapman v. United States, 111 S. Ct. 1919 (1991).

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clidine (PCP). 21 U.S.C. §841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. The first row of the table illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP."

[5] Effective November 1, 1989, The Sentencing Commission explicitly adopted a conversion interpretation, applied it to methamphetamine as well, and added the footnote to the Drug Quantity Table referenced in the Court of Appeals decision in this case. (See Appendix A at p.4.)

C. **The Ninth Circuit Decision Conflicts with the Plain Language of the Statute, and this Court's and the Fourth Circuit's Reading of the Statute.**

21 U.S.C. 841(b)(1)(B) provides that, in a case involving "10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP)", the penalty is ten years to life with a prior. On the other hands, 21 U.S.C. 841(b)(1)(C) provides for a penalty of up to 30 years with a prior in a case not governed by 841(b)(1)(B).

On its face, this language distinguishes as to penalty based on two forms the substance may be found in the real world -- pure PCP and a mixture containing PCP -- and does not call for conversion.

In connection with a decision on the LSD penalty provisions which refer only to a mixture or substance containing LSD, this Court observed that the alternative

reference to PCP and methamphetamine in the statute referred to pure PCP and pure methamphetamine.

> "Thus, with respect to these two drugs [PCP and methamphetamine], Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug." Chapman v. United States, 111 S.Ct. 1919, 1924 (1991).

This Court also observed the statute generally was intended to provide for the penalties to be determined by the weight of the drugs in whatever form they were found.

> "It [Congress] intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found -- cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level, Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going." Chapman v. United States, supra, 111 S.Ct. at 1925.

In United States v. Skelton, 901 F.2d 1204 (4th Cir. 1990), the Fourth Circuit, in connection with resolution of a related issue and in interpreting the statutory provision at issue stated:

> "Congress has mandated a distinction between pure PCP and PCP mixtures". Id. at 1206.[6]

The premise of United States v. Stoner, supra, 927 F.2d at 46, adopted by the Ninth Circuit, is that the statute does not refer to pure PCP or pure methamphetamine -- "The statute does not say 'pure' methamphetamine and the statute can be read to have a logical meaning without it."

This premise is in conflict with this Court's and Fourth Circuit's reading of the statute.

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[6] Also, "An exception was made in the case of PCP, because Congress specifically provided for a distinction between PCP and a mixture containing PCP." Id. at 1205.

D. The Conclusion That a Non-Conversion Statutory Interpretation Poses Line Drawing Difficulties Conflicts With a Related Statutory Provision and A Decision of the Second Circuit.

A controlled substance combined with another chemical that is present as an impurity is not a mixture or substance, rather it is a pure controlled substance. 21 U.S.C. 802(40).[7] Thus, there is no statutory difficulty in identifying a pure substance versus a mixture.

Moreover, in U.S. v. Macklin, 927 F.2d 1272 (2d Cir. 1991), the Second Circuit found there is no genuine difficulty, both as a matter of general outstanding and standard chemical understanding, in determining whether a substance is a pure one or a mixture. The distinction is not made merely on the basis of impurities, but simply

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[7] "(40) The term 'chemical mixture' means a combination of two or more chemical substances, at least one of which is not a listed precursor chemical or a listed essential chemical, except that such term does not include any combination of a listed precursor chemical or a listed essential chemical with another chemical

on the basis of whether an adulterant has been added. (Id. at 1282-83.)

E. **The Ninth Circuit Decision Conflicts With The Legislative History.**

Contrary to the assumption in Alfeche, supra, 942 F.2d at 699, and Stoner, supra, 927 F.2d at 47, there is specific legislative history regarding the PCP penalty provision which indicates that Congress intended to differentiate between PCP recovered in its pure form and PCP mixed with a dilutent.

House Report (Judiciary Committee) 99-845 sets out the quantity based system of penalties implemented by the Anti-Drug Abuse Act of 1986. See, Chapman v. United States, _U.S._, 112 S.Ct. 1919, 1927 (1991).

The threshold quantity for PCP was expressed as "100 grams or 10 grams if pure." H. Rep. 99-845 at 18. (Emphasis added.)

That form of expression differentiates according to form of existence; it does not express the result of a

computation. Nowhere in the legislative history is there any reference to using less than the total weight found, or to penalizing on some basis other than weight, or any reference to "net pure" computations, or any reference suggesting that percentage purity rather than weight was the relevant measure of severity in the system being implemented.

The methamphetamine penalty provisions were enacted as part of the Anti-Drug Abuse Act of 1988. The Senate section-by-section analysis indicates that methamphetamine was to be treated the same as PCP.

> "The reason methamphetamine was not included in the 1986 Act is that the quantity of methamphetamine appropriate to trigger the mandatory minimum sanctions had not yet been determined. The Department of Justice has now determined that the quantity of methamphetamine that justifies these penalties is the same as that currently set forth for PCP. Accordingly, the proposed amendment adopts these quantity levels."
>
> 134 Cong. Rec. S17367 (daily ed., Nov. 10, 1988).

There is no indication that any significance was attached to the fact that a mixture containing CP or methamphetamine was over ten percent pure. Neither does experience lend it any significance.

F. **The Statutory Penalty Distinction Between Pure PCP and Mixtures Containing PCP Does Not Lead to Absurd, Anomalous, or Illogical Results.**

There is a rational basis for punishing pure quantities of PCP and methamphetamine at a quantity-based threshold that is 10 times lower than for mixtures or substances. That basis is the difference in severity of conduct that separates manufacturing and distribution of PCP and methamphetamine. One who possesses or distributes a mixture of PCP or methamphetamine containing a dilutent is, in the absence of additional evidence, at least removed from the creative core activity of manufacturing. Congress has clearly stated that severity in that aspect of trafficking is to be measured by reference to total weight of a mixture or

substance. One who possesses pure PCP or methamphetamine is by virtue of that fact very closely associated to the manufacture of the drug. Distribution cannot occur without manufacturing. Manufacturers can be fairly held vicariously blameworthy for all the distribution activity that flows from their manufacturing because they enabled it to happen. The same cannot be said of people who interlope at lower levels of involvement. This rationale is supported by two studies of drug problems and policy cited as being influential with Congress in producing the Anti-Drug Abuse Acts, in B. James George Jr., The Comprehensive Crime Control Act of 1984 - Contemporary Criminal Practice, Vol. I, §6.03(a)-(d)(i), (Prentice-Hall Law & Business, 1988) (Supp. 1990). President's Commission on Organized Crime, Report to the President and the Attorney General, AMERICA'S HABIT: Drug Abuse, Drug Trafficking, and Organized Crime, (March, 1986) 60-69, 154-59; United States Drug Enforcement Administration, Office of

Intelligence, Special Report: The Illicit Drug Situation in the United States and Canada, 14-17.

According to the President's Commission on Organized Crime,

> "[I]t is estimated that all the PCP and . . . nearly all the methamphetamine . . . available on the illicit market in 1984 were produced in clandestine United States laboratories."

America's Habit at 154 citing the National Narcotics Intelligence Consumers Committee, Narcotics Intelligence Estimate 1984 (emphasis supplied).

In a system where distribution typically occurs of a diluted form of the substance there is reason to avoid giving a quantity based "break" to assessments of the severity of a manufacturer's conduct. Such reason assumes especial significance when applied, as is done in the statute, to the two drugs which are the principal nonnarcotic drugs of abuse and which owe their existence solely (in the case of PCP) or almost solely (in the case of methamphetamine) to the output of domestic,

clandestine laboratories. The statute thus makes a sensible distinction between manufacturers and distributors based on the nature of their activity.

The statutory provision is just one particular form of close policy call where in some peculiar circumstances close cases fall on different sides of the line of demarcation. United States v. Twomey, 845 F.2d 1132, 1136 (1st Cir. 1988).

Moreover, to the extent that additional evidence suggests, such as the hypothetical posed in Stoner, that some possessors of mixtures ought to be treated more harshly because of their close proximity to manufacturing, the sentencing guidelines and the cases recognize that that can be done when factually appropriate. See, e.g., U.S.S.G. §2D1.1, application note 9; United States v. Martinez-Duran, 927 F2d 453, 456 (9th Cir. 1991).

G. **The Choice of the Harshest Possible Interpretation of a Statutory Provision Based on the Convenience of the Court and Prosecution is Inconsistent With the Decisions of This Court.**

The plain language of the statute and related provisions, the legislative history, and the policy of the statute demonstrate that the statute differentiates between PCP and methamphetamine recovered in their pure form and those substances recovered as part of a mixture.

Based on the language of the statute and the rationale of the decisions of the Court of Appeals in this case and in Stoner, it is clear that the language of the statute does not plainly call for the conversion and whichever is greater penalty interpretation. Rather, the First and Ninth Circuits justified this interpretation on convenience and preferred policy grounds.

For the reasons set out above, the relied upon policy grounds are baseless in law and fact.

The First and Ninth Circuits' reliance on these grounds demonstrates that if the statute does not differentiate as to the form in which these substances are recovered, it is at least ambiguous.

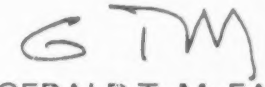
Such a statute is not to be construed to call for the harsher penalty based on the Court of Appeals policy preference. United States v. R.L.C., 112 S.Ct. 1329, 1334 (Mar. 24, 1992); United States v. Wiltberger, 5 Wheat 76, 95-96 (U.S., 1820); Evans v. United States, 112 S. Ct. 1881, 1903 (May 26, 1992) (Thomas, J., dissenting).

Rather in such a circumstance, the decisions of this Court call for the interpretation which yields the lesser sentence. United States v. R.L.C., supra, 112 S.Ct. at 1338.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,



DATED: 8 October 1992

GERALD T. McFADDEN
Attorney for Petitioner
Antonio Zapata

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 91-10290
	)	
Plaintiff-Appellee,	)	DC No.
	)	CR-90-00324-WBS
v.	)	
	)	MEMORANDUM*
ANTONIO ZAPATA,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted May 11, 1992**
Withdrawn from Submission May 13, 1992
Resubmitted June 9, 1992
San Francisco, California

Before: BOOCHEVER, REINHARDT, and KOZINSKI, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for submission without oral argument pursuant to Fed. R. App. P. 34(a), and Ninth Cir. R. 34-4.

APPENDIX A

Zapata was convicted of distribution and aiding and abetting the distribution of phencyclidine (PCP). He appeals his sentence of 360 months imprisonment on two grounds. First, he contends that the court erred in basing the term on the net pure percentage of PCP in the seized drugs rather than on the total weight of the mixture. Second, he contends that the court erred in sentencing him as a career offender based on his prior conviction for possession of a firearm by a felon. We vacate his sentence and remand.

1. Calculation Based on Net Pure Percentage of PCP

Zapata sold and attempted to sell PCP which weighed a total of approximately 76 grams, and was 71 to 82% pure (the rest was manitrol). It thus contained approximately 59 grams of pure PCP. Classified as a "mixture", the 76-gram total was below the 100-gram threshold for "mixtures" carrying a 10-year minimum sentence under 21 U.S.C. § 841(b)(1)(B)(iv) (1988)[1],

[1] 21 U.S.C. § 841(b)(1)(B)(iv) requires a 10-year minimum sentence for defendants, such as Zapata, who have been convicted previously for one or more felony drug offense.

and the base offense level under the Sentencing Guidelines would have been 22. The district court, however, based the sentence on the net pure PCP contained in the mixture (59 grams), which was above the 10-gram threshold for "pure" PCP set forth in the statute, thereby requiring a 10-year minimum sentence. The resulting base offense level under the Guidelines was 28. U.S.S.G. § 2D1.1(c) (drug quantity table (8)) (Nov. 1990).

Zapata argues that it was improper to convert a "mixture" to a "pure" substance because the legislative history of the statute evinces an intent to treat pure PCP and mixtures of PCP differently in terms of severity of sentence. The Sentencing Guidelines, however, as well as Ninth Circuit precedent require that we affirm the district court. A footnote to the drug quantity table states: "In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, *whichever is greater.*" U.S.S.G. §2D1.1(c)

note at 2.47 (Nov. 1990) (emphasis added). Here, the district court chose the greater offense level in accord with this note, based on the weight of the pure PCP. Moreover, the commentary supports the district court's reading of this section, noting that "in the case of PCP . . . the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table)", U.S.S.G. § 2D1.1, comment. (n.9). Thus, in the case of PCP, purity does *not* provide grounds for departure as for other drugs. In other words, allowing calculation of net pure weight results in a highly accurate offense level.

In *United States v. Alfeche*, 942 F.2d 697 (9th Cir. 1991) (per curiam), we approved a sentence based on calculating the net amount of pure methamphetamine (treated the same as PCP under the statute and guidelines) in the substances seized, citing the footnote to the Drug Quantity Table. The difference in *Alfeche* is that the substances seized were from 97% to 100% pure methamphetamine. We noted that following a "whichever is greater" approach was preferable to deciding in

each case how "pure" the mixture has to be in order to apply the "pure" threshold amount. *Id.* at 699. *See also, United States v. Bressette*, 947 F.2d 1361, 1362 (9th Cir. 1991) (applying similar approach in a methamphetamine case and observing that "[t]he [Guidelines] footnote is perfectly clear and consistent on its face and to interpret it we need not go beyond the words themselves.").

In sum, the district court did not err in calculating Zapata's sentence based on the net pure amount of PCP in the substance seized.

2. Career Offender Classification

The district court classified Zapata as a career offender based on a 1987 conviction for possession of a firearm by a felon, a classification that nearly doubled his sentence over that based on the amount of PCP involved in the offenses. Zapata argues that this offense is not a "crime of violence" that would qualify him for career offender status under U.S.S.G. § 4B1.1. We agree.

In *United States v. Sahakian*, No. 91-10199, 1992 U.S. App. LEXIS 11516, at *4-*8 (9th Cir. May 26, 1992), we joined a number of other circuits in holding that possession of a firearm is not a crime of violence within the meaning of the Guidelines' career offender provisions, as amended in November 1989. This amendment was in effect on the date Zapata was sentenced. Our interpretation is also in accord with the November 1991 amendment to the Application Notes clarifying the career offender provisions: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." U.S.S.G. § 4B1.2 comment. (n.2) (Nov. 1991).

We therefore VACATE Zapata's sentence and REMAND for a recalculation of his sentence without career offender status.

FILED

JUN 15 1992

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 91-10290
	)	
Plaintiff-Appellee,	)	DC No.
	)	CR-90-00324-WBS
v.	)	
	)	ORDER
ANTONIO ZAPATA,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

Before: BOOCHEVER, REINHARDT, and KOZINSKI, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Kozinski reject the suggestion for rehearing en banc and Judge Boochever so recommends.

APPENDIX B

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED

AUG 10 1992

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U.S. COURT OF APPEALS